

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SARAH BARNEY-HEFFNER**

Claimant

VS.

**RUSSELL STOVER CANDIES**

Respondent

AND

**TRAVELERS INDEMNITY CO. OF  
AMERICA**

Insurance Carrier

Docket No. 1,049,284

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the March 1, 2012, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on June 5, 2012. William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Brenden W. Webb, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant did not demonstrate that she suffered personal injury by accident and thus failed to establish that her claimed injuries arose out of and in the course of her employment. The ALJ further found that the claimant did not timely provide respondent with notice of her alleged injury.

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

Claimant contends the ALJ erred in finding she failed to prove she suffered personal injury by accident that arose out of and in the course of her employment with respondent and in finding that she failed to give respondent timely notice of her accidental injury.

Claimant asks that the Board reverse the ALJ and remand the case for findings on claimant's remaining issues, including nature and extent of disability.

Respondent asserts that the ALJ's Award should be affirmed in its entirety.

The issues for the Board's review are:

- (1) Did claimant sustain an accidental injury that arose out of and in the course of her employment with respondent?
- (2) Did claimant give respondent timely notice of her work-related accident?

#### **FINDINGS OF FACT**

Claimant began working for respondent on January 19, 2006. She started in the molding department and was later moved to the enrobing department, where a caramel or marshmallow center, for example, would be enrobed (covered) with chocolate. Her duties included weighing candy, threading candy through the line, cleaning and mopping. Claimant testified that on January 12, 2010, she was lifting a mogul tray when she felt a pop and pain from her neck to her left shoulder and down her arm. She said she reported the injury to her lead worker, Tammy Woltersdorf, who told her to speak with Russell Lemonds, respondent's health and safety coordinator. Claimant said she spoke with Mr. Lemonds, explaining to him the mechanism of her injury and telling him she had pain in her neck, in the front of her left shoulder, and in her left arm. Mr. Lemonds sent claimant home.

Claimant returned to work the next day, January 13, 2010. She felt increased pain in her shoulder and chest and felt as though she was having a heart attack. She reported her symptoms to Ms. Woltersdorf, who again sent her to Mr. Lemonds. Claimant said she pointed to her chest area in explaining to Mr. Lemonds where she was feeling pain. Mr. Lemonds offered to call an ambulance, but claimant decided to go home.

Mr. Lemonds testified that when claimant came in on January 13, she complained of only chest pain and lightheadedness. She did not complain of symptoms or pain in any other part of her body. She did not tell him she had suffered an injury at work. Claimant told him she had significant pain, which she indicated to him was about mid-sternum. Mr. Lemonds did a health assessment on claimant and offered to call an ambulance, which claimant declined.<sup>1</sup>

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<sup>1</sup> Although claimant had testified that Mr. Lemonds had approved her leaving work early on January 12, neither counsel for claimant nor counsel for respondent asked him about that meeting in his deposition.

After seeing Mr. Lemonds, claimant went to the office of Virginia Helman, the human resource manager for respondent's plant in Iola. Claimant told Ms. Helman she was leaving work early and wanted to fill out an application for a medical leave of absence due to her shortness of breath and sharp pains in her chest. Claimant did not indicate she was having any other symptoms and did not point to any part of her body when indicating where she had pain. Claimant did not say she was having complaints or pain in her shoulder or neck, and claimant did not tell her anything about a work injury. Ms. Helman took down claimant's information on a Leave of Absence Intake Form and faxed it to Diana Meyrand, respondent's assistant vice president of human relations.

Later on January 13, 2010, claimant sought treatment at Yates Center Medical Clinic.<sup>2</sup> Claimant was seen by Dr. Jon Sides. His medical note of that day indicates that claimant complained of a little bit of chest wall discomfort which she said had started that morning. Dr. Sides' history also states: "She thought she got a little shortness of breath but she is also kind of a nervous, anxious person."<sup>3</sup> Claimant also told Dr. Sides she had lifted 50-pound fiberglass racks at work the day before and she had a rash on her arms. Dr. Sides gave her medicine for her rash. Concerning claimant's complaints of chest pain, Dr. Sides found claimant had reproducible tenderness in the area above her left breast and in her left axillary region. Claimant was asymptomatic at the time he saw her, but she said the pain came in waves. Dr. Sides gave her some pain medication and told her to watch for any symptoms of a heart attack. He stated: "At this point it is most likely chest wall in nature."<sup>4</sup>

On January 14, 2010, claimant returned to Ms. Helman. Ms. Helman had received a packet containing the information and application for medical leave under the Family and Medical Leave Act (FMLA). Ms. Helman went over the packet with claimant, telling her she had 15 days in which to get a medical certification to support her request for leave.

The same day, January 14, claimant returned to the Yates Center Medical Clinic. This time she was seen by a physician's assistant, Sarah Nuessen, for a followup on left arm pain. Claimant reported that her left arm pain was worse and she felt like there was more tingling in her fingertips. Claimant stated she could not move her left arm much and was concerned because she was unable to work. Ms. Nuessen found claimant was tender to palpation along the upper aspect of the left chest wall into the shoulder, as well as over the biceps tendon and the deltoid muscle and back into the trapezius muscle. Ms. Nuessen diagnosed claimant with left shoulder strain and took her off work for a week. Ms. Nuessen also completed the FMLA certification required by claimant to receive medical

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<sup>2</sup> Claimant testified she saw her personal physician, Dr. John Atkin, but the records indicate she was instead seen by Dr. Jon Sides, who is also associated with Yates Center Medical Clinic.

<sup>3</sup> P.H. Trans. (Apr. 14, 2010), Resp. Ex. 1 at 1.

<sup>4</sup> *Id.* at 2.

leave. On the form, Ms. Nuessen set out that claimant “presents to office with severe [left] shoulder pain. Range of motion very limited. Dx: [left] shoulder strain.”<sup>5</sup> Ms. Nuessen further indicated that the approximate date the condition commenced was January 12, 2010, and also said that claimant should be off work from January 13 to January 20, at which time claimant was to be seen for a follow up.<sup>6</sup>

On January 14, 2010, claimant’s request for FMLA leave was approved by respondent. Claimant signed and dated the Leave of Absence Request Form on that day, however the form itself was filled out by Ms. Meyrand based on information received from Ms. Helman. That form indicated the specific reason for her requested leave was “Personal Illness”<sup>7</sup> and indicated she had a “serious health condition that makes you unable to perform the essential functions of your job.”<sup>8</sup> Claimant’s leave was to run from January 13, 2010, to January 20, 2010. As of January 20, claimant was to send further supporting documentation if she felt she needed more medical leave time. Respondent did not receive any further medical documentation from claimant, and on January 25, 2010, Ms. Meyrand sent claimant a letter informing her that because she failed to comply with the policies of the FMLA, she was being terminated effective January 21, 2010. Claimant received that letter on January 26 or 27, and on January 27, 2010, she called Ms. Meyrand to discuss the letter. Claimant asked Ms. Meyrand if she still had a job, and Ms. Meyrand answered that she had been terminated. At that point, claimant told Ms. Meyrand that she believed she had hurt herself at work. Ms. Meyrand told claimant if that was the case, she needed to file a report with Mr. Lemonds.

Also on January 27, 2010, claimant was seen by Dr. Shane Fejfar, to whom she had been referred by Dr. John Atkin of the Yates Center Medical Clinic. Dr. Fejfar’s consultation report of January 27, 2010, gives a history that claimant “was lifting some fifty pound trays and she thinks that is when her arm probably started bothering her. She really has no specific event where it made her drop something, where something fell on her, or any activities such as that.”<sup>9</sup> Claimant complained of numbness from the left shoulder to the elbow circumferentially all the time “since January 12.”<sup>10</sup> Dr. Fejfar diagnosed claimant with global shoulder pain and recommended she have an MRI of her left shoulder and physical therapy.

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<sup>5</sup> P.H. Trans. (Apr. 12, 2010), Cl. Ex. 3 at 1.

<sup>6</sup> It is not known if claimant was seen at the Yates Center Medical Clinic on January 20, 2010. If she was seen, that medical record was not made part of the record in this claim.

<sup>7</sup> Helman Depo., Ex. 2 at 1.

<sup>8</sup> *Id.*, Ex. 2 at 2.

<sup>9</sup> P.H. Trans. (Apr. 14, 2010), Resp. Ex. 2 at 1.

<sup>10</sup> *Id.*

The next day, January 28, 2010, claimant met with Mr. Lemonds and filled out a report of injury. The report indicates that at 8 a.m. on January 11, 2010, claimant injured her neck, arm and shoulder after lifting mogul trays.<sup>11</sup> She claimed she had pain and numbness. Mr. Lemonds testified that the report was filled out by claimant and that she signed it in his presence. Mr. Lemonds said January 28, 2010, was the first time he became aware that claimant was indicating she had suffered a work injury to her neck, left shoulder and left arm. He said he had no contact with claimant between January 13, 2010, when she complained of chest pain and lightheadedness, and January 28, 2010, when she filled out an accident report. Claimant said after reporting her injury, respondent sent her to the company physician, Dr. Wolfe. Dr. Wolfe gave claimant a muscle relaxer and another anti-inflammatory medication. Claimant only saw Dr. Wolfe on one occasion.

On March 1, 2010, claimant was seen by Dr. Edward Prostic, a board certified orthopedic surgeon, at the request of claimant's attorney. Claimant gave Dr. Prostic a date of accident of January 11, 2010, but Dr. Prostic agreed that any references in his report to the date of accident being January 11 can be changed to a date of accident of January 12. When Dr. Prostic saw claimant on March 1, 2010, claimant told him she was injured during the course of her employment when she repetitively lifted 50-pound racks to above shoulder level and felt a pop as she lifted the last one. She said she reported her injury and was seen by Dr. Jon Sides, who diagnosed her with chest wall pain. She was later referred to Dr. Fejfar, and x-rays were taken of her shoulder and an MRI and physical therapy were requested. The MRI was performed but physical therapy was not provided. Claimant denied previous problems with her neck or left upper extremity or any other area of preexisting musculoskeletal impairment.

Claimant told Dr. Prostic that she had an almost constant ache in her left shoulder and had pain and burning that went from the left side of her neck to her left elbow. She said she was unable to lie on her left side and has difficulty reaching above shoulder level, behind her neck and behind her back. She had problems with pushing, pulling, reaching and lifting. She complained of clicking, popping and weakness.

After examining claimant, Dr. Prostic diagnosed her with an intra-articular injury to her shoulder, most likely a small tear of the rotator cuff. He recommended she have treatment including physical therapy, anti-inflammatory medicines and intra-articular steroid injection. Dr. Prostic believed claimant should be restricted to light duty employment and should avoid the use of her left hand above shoulder level.

Dr. Prostic saw claimant a second time on February 4, 2011. Claimant had received no treatment since he had last seen her on March 1, 2010. She continued to complain of

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<sup>11</sup> Ten days from that date, excluding intervening weekends and the Martin Luther King holiday, would calculate to January 26, 2010. Consequently, if the date of accident was January 11, 2010, claimant did not provide notice of her accident within ten days. If the date of accident was January 12, 2010, then her conversation with Ms. Meyrand would have been on the tenth day.

frequent pain in her left shoulder. Her main complaint was a feeling of heaviness about the upper arm and numbness about the shoulder.

Dr. Prostic performed an examination of claimant on February 4, 2011, after which he found claimant had evidence of anterior instability. Claimant continued to have rotator cuff dysfunction. Dr. Prostic said it was uncertain whether the predominant cause of her current problem was instability, a rotator cuff lesion, or a superior labrum anterior posterior (SLAP) tear. Dr. Prostic said the rotator cuff tear he saw in the MRI at the time of his March 1, 2010, examination was very small, and he would have expected it would have become asymptomatic by the time he saw her the second time. He said the pop claimant reported at the time of injury could have been a rotator cuff tear or a SLAP lesion. Because of the course of claimant's problem, Dr. Prostic believed it was more likely she had a SLAP tear than the rotator tear. But he said it is not possible to be certain without either an MRI with contrast or looking directly into the shoulder.

Dr. Prostic opined claimant's conditions were caused or contributed to by her work accident on or about January 12, 2010. Dr. Prostic also stated that claimant would have been under physical restrictions from the date of the injury through February 4, 2011. He believed claimant would benefit from additional medical treatment and recommended physical therapy, anti-inflammatory medicines and steroid injection. Using the AMA *Guides*,<sup>12</sup> Dr. Prostic rated claimant as having a 12 percent permanent partial impairment of the left upper extremity.

Claimant filed an Application for Hearing on February 2, 2010, in which she claimed injuries to her neck, left shoulder, arm, and all other parts of the body affected while lifting mogul trays "on or about January 11, 2010."<sup>13</sup> A preliminary hearing was held on April 14, 2010, at which claimant amended her date of accident to January 12, 2010.

MR. PHALEN (claimant's attorney): . . . We have pled this as on or about January 11, 2010, but I think the date of accident, the evidence will show will be January 12, 2010.<sup>14</sup>

Q. (by claimant's attorney) You are here today, Sarah, as a result of a work injury that occurred at Russell Stover Candies on or about January 12, 2010, is that correct?

A. (by claimant) Yes.<sup>15</sup>

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<sup>12</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>13</sup> Form K-WC E-1, Application for Hearing filed February 2, 2010.

<sup>14</sup> P.H. Trans. at 4-5.

<sup>15</sup> P.H. Trans. at 5-6.

**PRINCIPLES OF LAW**

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>16</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>17</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>18</sup>

K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice

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<sup>16</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>17</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>18</sup> *Id.* at 278.

unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

### ANALYSIS

On January 12, 2010, claimant sustained personal injury to her shoulder while performing her regular job duties, which included lifting 50-pound mogul trays. That same day, claimant reported her injury to her lead worker, Tammy Woltersdorf, and to respondent's health and safety coordinator, Russell Lemonds. The confusion about this injury is due, at least in part, to claimant describing symptoms of chest pain and shortness of breath. But when asked to point to the area of her chest where she experienced pain, claimant pointed to the front of her shoulder and the area just below the shoulder joint in her chest and in her arm.

Respondent disputes that claimant reported her injury as being work related before January 27, 2010. Even so, excluding intervening weekends and the Martin Luther King, Jr., holiday, January 27, 2010, is the tenth day following the January 12, 2010, accident. The 10-day notice requirement in K.S.A. 44-520 was, therefore, satisfied.

Claimant sought medical treatment on her own with her personal physician, Dr. Jon Sides, on January 13, 2010. She mentioned lifting 50-pound racks at work the day before. Dr. Sides found claimant had tenderness in the area above her left breast and in her left axillary area. He believed her problem to be related to her chest wall. He prescribed pain medication.

The next day, January 14, 2010, claimant returned to that same clinic but was seen by a physician's assistant, Ms. Nuessen. Claimant reported left arm pain and pain along the upper chest into the shoulder. She had limited range of motion. Ms. Nuessen diagnosed left shoulder strain and recommended claimant be off work for a week. After her termination, claimant was seen by respondent's company physician, Dr. Wolfe. He prescribed a muscle relaxer and an anti-inflammatory medication. The recommended physical therapy, however, was never provided. Again, on her own, claimant went to Dr. Fejfar on January 27, 2010. The history he was given was arm and shoulder pain after lifting 50-pound trays on January 12, 2010.



In addition to the testimony given by claimant, the record also contains medical reports and deposition testimony of Dr. Prostic relating claimant's shoulder injury to her work, specifically lifting 50-pound trays. There is no contrary expert medical opinion testimony. The greater weight of the credible evidence is that claimant suffered personal injury by accident on January 12, 2010, that arose out of and in the course of her employment with respondent.

There are additional issues raised by the parties at the Regular Hearing that, because of his findings, were not reached by the ALJ in the Award. Accordingly, this matter will be remanded to the ALJ for his determination of those remaining issues.

#### **CONCLUSION**

(1) Claimant sustained an accident and injury on January 12, 2010, that arose out of and in the course of her employment with respondent.

(2) Claimant gave respondent timely notice of her work-related accident.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated March 1, 2012, is reversed and this matter is remanded to the ALJ for a determination of the remaining issues.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge